(1)

90-1086

No. _____

In The

Supreme Court of the United States

October Term 1990

CALIFORNIA ASSOCIATION OF
PHYSICALLY HANDICAPPED, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an earlier court ruling upholding the Federal Communications Commission's (FCC or Commission) adjudicatory decision approving license renewals to broadcasters who failed to provide viewing and employment opportunities for Americans with disabilities, because the Commission had not yet promulgated a rule requiring such opportunities, is res judicata barring petitioner California Association of the Physically Handicapped (CAPH) from challenging the Commission's final Congressionally mandated rule, on the ground that the rule erroneously failed to provide such opportunities, as required by the Rehabilitation Act.

2. Whether the court below erroneously applied res judicata, since CAPH's petition to review is a separate claim which it could not have raised in its license challenge, and the issue decided in the license case is different than the issue raised in this case.

3. Whether res judicata is inapplicable in this case, even if the doctrine arguably would otherwise apply, because

a. Res judicata cannot preclude an aggrieved party who participates in a Congressionally mandated rulemaking proceeding from challenging the final rule on the ground that it is contrary to constitutional right and not in accordance with law.

b. Res judicata cannot relieve the Court of Appeals of its duty, imposed by 28 U.S.C. § 2342, to determine whether the Commission's rule, promulgated to implement section 504 of the Rehabilitation Act, in fact violates the Act.

QUESTIONS PRESENTED – Continued

c. The public interest considerations in assuring that the FCC complies with the Rehabilitation Act and the Constitution outweigh the concerns that undergird res judicata.

4. Whether the Commission's rule violates section 504 of the Rehabilitation Act because the rule permits the Commission to administer its licensing and equal employment opportunity programs in a manner that subjects Americans with disabilities to discrimination.

5. Whether, notwithstanding *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), petitioner's claim under the equal protection provision of the Fifth Amendment must be examined under "strict scrutiny" because Congress found in the Americans With Disabilities Act of 1990 that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." Pub. L. 101-336, § 2(a)(7), 104 Stat. 327, 329 (July 26, 1990).

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, California Association of Physically Handicapped, Inc. (CAPH),* prays that the Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed and entered June 22, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals denying CAPH's petition to review a final FCC Order is unreported and is

* CAPH has no parent or subsidiary.

set forth as Appendix A (1a-3a). The Federal Communications Commission's Report and Order issued April 15, 1987 is reported at 2 FCC Rcd. 21199 (1987) and is set forth as Appendix B (4a-66a).

JURISDICTION

Pursuant to 47 U.S.C. § 402(a), 28 U.S.C. § 2342(1), and 5 U.S.C. § 702, petitioner filed a petition to review the FCC Report, Order and Final Regulation issued April 15, 1987. On June 22, 1990 the Court of Appeals for the Ninth Circuit denied the petition for review. A duly filed petition for rehearing was denied on September 5, 1990. A copy of the order denying the petition for rehearing is set forth as Appendix C (67a). On November 23, 1990, Justice O'Connor extended petitioner's time to file its petition for Writ of Certiorari to and including January 3, 1991.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of liberty or property . . . without due process of law. . . .

2. 47 U.S.C. § 402(a) provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under

this Chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Chapter 158 of Title 28.

3. 28 U.S.C. § 2342 provides in relevant part:

The Court of Appeals has exclusive jurisdiction to enjoin, set aside, suspend, (in whole or in part), or to determine the validity of –

(1) All final orders of the Federal Communications Commission made reviewable by Section 402(a) of Title 47.

4. 5 U.S.C. § 702 provides in relevant part:

Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. . . .

5. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, provides in relevant part:

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations.

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section

made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

STATEMENT OF THE CASE

A. In 1978 Congress amended the Rehabilitation Act of 1973, 29 U.S.C. § 794, making the Act applicable to federal agencies and mandating that the head of each agency "shall promulgate such regulations as may be necessary to carry out the amendments" to the Act. Initially the FCC took the position that it did not come within the provisions of the Act because it is an independent regulatory agency.[1] Finally, seven years after the 1978 amendment to the Rehabilitation Act the Commission filed a notice of rulemaking in the Federal Register. 50 Fed. Reg. 35, 262 (Aug. 30, 1985).

The notice stated, in accord with the Act, that with regard to its programs or activities the rule "requires that the opportunity to participate or benefit accorded to a handicapped person be as effective as that accorded to others"; prohibits "the Commission from limiting a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving any aid, benefit, or service"; and prohibits "the

[1] In *Williams v. United States*, 704 F.2d 1162, 1163 (9th Cir. 1983) the court held that all federal agencies, including the FCC, are required to promulgate a section 504 regulation in accordance with the 1978 amendment to the Rehabilitation Act.

Commission from utilizing criteria or methods of administration that deny handicapped persons access to the Commission's programs or activities." *Id.* at 35,264-65.

The Commission expressly asserted, however, that its rule did not impose on its licensees any burden to accommodate the handicapped minority. As the FCC put it, "it should be clearly understood that the programs or activities of entities that are licensed . . . by the Commission are not covered by these proposed regulations." *Id.* at 35,262 n.4. Section 1.1802 of the proposed rule provided that the rule applies to all programs or activities conducted by the Commission but that the programs and activities of its licensees are not covered by these proposed regulations. Section 1.1830(b)(6) recognized that under the Act "[t]he Commission may not administer a licensing . . . program in a manner that subjects qualified handicapped persons to discrimination" but quickly added that the programs or activities of its licensees are not covered by the rule. 50 Fed. Reg. at 35,269.

The proposed rule contained *no* proposals on how the Commission's licensees might make television more accessible to hearing-impaired viewers or how they might take appropriate action to afford Americans with disabilities greater job opportunities in the broadcast industry.

B. Petitioner filed a comment urging the Commission to administer its licensing and equal opportunity programs in a manner to prohibit discrimination by its licensees against Americans with disabilities. CAPH specifically asked the Commission to require broadcast

licensees to caption a reasonable portion of their television programs and to afford qualified handicapped individuals with an equal employment opportunity in the broadcast industry. Failure to do so, CAPH argued, would exclude handicapped individuals from participating in, deny them the benefits of, and otherwise subject them to discrimination under the FCC's programs.

Petitioner called the Commission's attention to this Court's statement in *Community Television v. Gottfried*, 459 U.S. 498, 503 (1983), that the Rehabilitation Act reflects a national policy of extending increased opportunities to hearing impaired viewers and that the public interest standard requires the Commission and its licensees to make television "more available and more understandable to the substantial portion of the population that is handicapped by impaired hearing." Petitioner noted that *Community Television* asserted that all television stations, public and commercial, have an equally strong obligation in serving the hearing-impaired viewers, *see id.* at 511, and that a licensee "may [not] simply ignore the needs of the hearing impaired." *Id.* at 509.

Turning to the Commission's EEO program, petitioner recited the Commission's many efforts to require licensees to provide employment opportunities in the broadcast industry to minorities and women,[2] and urged

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[2] *See, e.g., Petition for Rule Making to Require Broadcast Licensees to Show Non-Discrimination in Their Employment Policies*, 13 FCC 2d 766 (1968); *Petitioner for Rule Making to Require Broadcast Licensees to Show Non-Discrimination in Their Employment Practices*, 18 FCC 2d 240 (1969); *Petition for Rule Making to*

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the FCC to afford similar opportunities to Americans with disabilities. This was necessary, CAPH argued, to insure that broadcasts fairly reflect the tastes and viewpoints of the disabled community. *See NAACP v. FPC*, 435 U.S. 662, 670-71 n.7 (1976).

Twenty-three major organizations of and for Americans with disabilities[3] filed a joint comment asserting that the Commission was proposing an extraordinarily limited application of section 504 to the Commission's programs and activities by ruling that the programs or activities

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Require Broadcast Licensees to Show Non-Discrimination in Their Employment Practices, 23 FCC 2d 430 (1970); *Non-Discrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC 2d 354 (1975); *Non-Discrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 266 (1976); *Statement of Policy and Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978).

[3] The Center for Law and Social Policy, the American Council of the Blind, the National Center for Law and the Deaf, the National Association of the Deaf, the Disability Rights Education and Defense Fund, the Epilepsy Foundation of America, the National Society for Children and Adults with Autism, an Association for Children and Adults With Learning Disabilities, National Easter Seal Society, National Association of Protection and Advocacy Systems, National Recreation and Parks Association, Council for Exceptional Children, the United Cerebral Palsy Associations, Inc., the American Coalition of Citizens With Disabilities, the Association for Retarded Citizens, Spina Bifida Association of American, National Rehabilitation Association, National Council on Rehabilitation Education, National Association of Private Residential Facilities for the Mentally Retarded, National Head Injury Foundation, Inc., the Convention of American Instructors of the Deaf, and Conference of Educational Administrators Serving the Deaf.

that are licensed by the Commission are not covered by the regulations, and challenged the Commission's contention that it had no authority to impose obligations on its licensees, characterizing the Commission's position as "an absurd interpretation of the 1978 amendment, especially since grants by the FCC of licenses are a necessary prerequisite to commercial and public use of the airways."

The National Center for law and the Deaf, the National Association of the Deaf, and the Center for Law and Public Policy urged the FCC to "include a prohibition against handicapped discrimination in the standards for license eligibility."

C. The final Report and Order, promulgated April 15, 1987, rejected all these proposals and imposed "no obligations or requirements" upon its licensees. 6a. *See also* § 1.1830(b)(6)[4] of the rule, 54a, ("The Commission may not administer a licensing program" in a discriminatory manner, but activities of licensees are not covered by the rule.).

The Commission noted that CAPH had argued that the primary activity of the FCC is licensing broadcasters and that the FCC should therefore administer its licensing program to require broadcast licensees "to provide closed-captioning . . . and equal employment opportunities" for disabled individuals. 25a. Rejecting these proposals the FCC stated that they were "beyond the scope of this proceeding." 25a.

Moreover, the FCC stated, these proposals had been rejected by this Court in *Community Television* and by other courts. 25a-26a. According to the Commission, this

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[4] *See* "Erratum," 65a, changing section 1.1601, et seq. to section 1.1801, et seq.

Court concluded in *Community Television* "that Congress had not intended the Rehabilitation Act . . . to impose any new enforcement obligations on the . . . Commission," and that "the public interest standard of the Communications Act was insufficient to create any obligations to enforce section 504" of the Act. 26a.

D. CAPH filed a petition for review pursuant to 47 U.S.C. § 402(a), 28 U.S.C. § 2342 and 5 U.S.C. § 702, asserting that it and its members suffered legal wrong, and were adversely affected by the Commission's action within the meaning of section 504 of the Rehabilitation Act and the Equal Protection Clause of the Fifth Amendment. CAPH asked the Ninth Circuit to determine whether the Commission had misunderstood its responsibility under the Act and whether the FCC was required to administer its licensing and EEO programs in a manner that requires its licensees to provide captioning and equal job opportunities to Americans with disabilities. The Ninth Circuit refused to exercise the jurisdiction conferred on it "to enjoin, set aside, suspend, . . . or to determine the validity of" the Commission's final order, 28 U.S.C. § 2342, holding that *California Ass'n of the Physically Handicapped v. FCC*, 840 F.2d 88 (D.C. Cir. 1988), *rehearing en banc denied*, 848 F.2d 1304 (1988) (*CAPH v. FCC* or the license case) was res judicata as to all issues.

E. In *CAPH v. FCC* the court held the FCC need not take into account, in a license renewal case, the extent to which broadcasters caption programs or provide equal job opportunities to handicapped individuals, because the Commission had no rule requiring such conduct. The court stated that a rulemaking proceeding and not an

adjudicatory proceeding is the appropriate forum for promulgating captioning and employment requirements "because of the arbitrariness of retroactive application and the inherent constraints of the adjudicatory process." *CAPH v. FCC*, 840 F.2d at 96-97 (citation and internal quotation omitted). Whatever obligation broadcasters may have under the Rehabilitation Act, the court stated, "it is settled that the FCC is not responsible for enforcing it through its licensing procedures." *Id.* at 92.

Chief Judge Wald (joined by judges Mikva and Edwards) voted to hear the case *en banc*, stating that the court's "hard line position" had profound implications for the hearing-impaired and could not be reconciled with the thrust of *Community Television v. Gottfried*, 459 U.S. 498 (1983). 848 F.2d at 1305.

REASONS FOR GRANTING WRIT

1. The Ninth Circuit erroneously applied res judicata since CAPH's petition to review the Commission's final order is a separate claim which it could not have raised in its license challenge, and the issue decided in the license case is different from the issue raised here. In erroneously applying res judicata to bar CAPH from challenging the Commission's final order the Ninth Circuit denied millions of Americans with disabilities of procedural rights secured by 5 U.S.C. § 702, of statutory rights afforded by the Rehabilitation Act, and of constitutional rights guaranteed by the fifth amendment.

The ruling also undermines the national commitment to provide "clear, strong, consistent, enforceable standards" to eliminate handicap discrimination by insuring that "the Federal Government plays a central role in enforcing the standards" to redress "the major areas of discrimination faced day-to-day by people with disabilities." Americans With Disabilities Act, Pub. L. 101-336 § 2(b), 104 Stat. 329 (July 26, 1990). In sum, the Ninth Circuit has used the doctrine of res judicata – a principle of public policy – to deny rather than to give justice, and has done so in an unreported, unreasoned, one-page opinion that does not cite a single case dealing with res judicata.[5]

a. The Ninth Circuit's ruling, coupled with the license case means that Americans with disabilities have no way of challenging the Commission's rule which violates the Rehabilitation Act, because a challenge was required to have been filed within sixty days of its entry, on April 15, 1987. 28 U.S.C. § 2344. This requirement is jurisdictional. *California Ass'n of the Physically Handicapped v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1987) ("We hold that the time limitation is jurisdictional.").[6]

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[5] *See* the dissenting opinion of Justice Stevens in *County of Los Angeles v. Kling*, 474 U.S. 936, 938 n.2 (1984) commenting on the proliferation of secret law through unreported cases.

[6] In that case in February 1980 CAPH filed a petition for rulemaking seeking inclusion of the physically handicapped in the Commission's programs to facilitate minority ownership of broadcast properties. The FCC announced its denial of the petition in a news release on December 13, 1985 almost five years after CAPH filed its petition. CAPH did not receive a

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The license case closed the door to future license challenges when the court ruled that CAPH's "continued attempts to force the FCC to impose captioning and hiring requirements in proceedings involving license renewals and transfers are simply inappropriate, and the FCC was well within its statutory authority in adopting a policy of summarily dismissing [CAPH's] petitions." 840 F.2d at 97.

The repeated and fruitless attempts of Americans with disabilities to compel the FCC to include a prohibition against handicapped discrimination in its licensing and equal employment opportunity programs is reflected in Appendix D (68a-70a). As the Commission itself acknowledges it has rejected *every* attempt by the disabled community to obtain the desired relief from the Commission. 25a-26a.

When action is sought in a license renewal proceeding the disabled community is told that rulemaking is the appropriate forum. *See Community Television*. When

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copy of the order until February 25, 1986, and was unaware of the order until its receipt. 833 F.2d at 1333. The court rejected CAPH's argument that "it reasonably relied on the FCC to provide notice in accordance with FCC rules, which require personal notice of FCC decisions to all parties," stating that "public notice commences the sixty-day period." *Id.* at 1334. According to the court, "[w]hile the FCC's failure to rule on CAPH's petition for almost five years is not commendable, once public notice of its decision was given the sixty-day period set forth in 28 U.S.C. § 2344 commenced," and CAPH acted unreasonably "in awaiting private notice of the decision before filing its petition." *Id.* at 1334 n.1.

rulemaking *was* sought the Ninth Circuit determined that relief should be sought in adjudicatory proceedings. *See Greater Los Angeles Council on Deafness v. Community Television*, 719 F.2d 1017, 1022-23 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) ("The District Court erred in ordering . . . rulemaking. The decision whether to proceed by adjudication or rulemaking lies in the first instance within the [agency's] discretion. . . . We hold that the decision not to promulgate rules at this time was not an abuse of discretion. . . . [The Supreme Court's decision in] *Community Television* contains no suggestion that the government must proceed by rulemaking. . . . [T]he decision not to proceed by rulemaking will permit the government to remain responsive to the developing technology in this area. Use of adjudication . . . allows the government to work with . . . broadcasters in developing programs that are accessible to hearing impaired viewers.").

Now petitioner is told that its proposal for captioning and employment opportunities is clearly "beyond the scope," 25a, of this rulemaking proceeding, mandated by Congress to implement the enforcement of the Rehabilitation Act.

b. In any event, res judicata cannot be used to bar a party to a rulemaking procedure from seeking and obtaining judicial review in accordance with 5 U.S.C. § 702. Judicial review is the final step in the rulemaking procedure, which has been described as "one of the greatest tools that government has for carrying out programs enacted by the legislative body," 1 K. Davis, *Administrative Law Treatise* 448 (2d ed. 1978), and Congress has imposed upon the courts of appeals the duty, in a case

properly brought before it, to determine the validity of any final rule issued by the FCC. 47 U.S.C. § 402(a), 28 U.S.C. § 2342(1). See *American Power & Light Co. v. SEC*, 325 U.S. 385, 390 (1945) (in permitting an aggrieved party to seek judicial review the Court stated that since Congress gave a right to judicial review it would not apply its "usual criteria of standing to sue.")

Over the last fifty years the Court has consistently held a person appealing an FCC order under section 402(b), of the Communications Act, 47 U.S.C. § 402(b) could seek and obtain judicial review, even if he failed to meet the usual standing requirements. This is so, the Court said, because it is "within the power of Congress to confer such standing to prosecute an appeal." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 477 (1940); *see also, FCC v. NBC*, 319 U.S. 239, 246 (1943). It follows a fortiori from the Court's rulings that a Congressional grant of a right to review an administrative ruling outweighs usual "standing" criteria, that it also outweighs the judicially created doctrine of res judicata.

c. Res judicata – both claim preclusion and issue preclusion – is particularly inappropriate where regulatory agencies are concerned, as these agencies are required to change the law as the times change. "Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and future within the inflexible limits of yesterday." *American Trucking Ass'n v. Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967); *see also*

Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968) ("Administrative authorities must be permitted, consistently with the obligations of due process to adapt their rules and policies to the demands of changing circumstances.").

In its brief in *Community Television* the FCC rehearsed a series of steps it promised to take, at the appropriate time, to make television more available and enjoyable to hearing-impaired viewers, and at oral argument the Commission advised the Court that it would continue to monitor developments in this area and would not hesitate to impose mandatory requirements after section 504's meaning became clarified, and technical and financial questions were resolved.[7] Oral Argument, October 12, 1982, 19-21. When *Community Television* gave the FCC time to deliver on its promises it surely did not believe that it was foreclosing future judicial oversight of the Commission in connection with captioning.

d. Neither claim preclusion nor issue preclusion applies to this case.

(i) The central claim here is that the Commission's rule, which was promulgated for the purpose of enforcing section 504 of the Rehabilitation Act, in fact violates the Act. In the license case the claim was that the 1983

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[7] The technical and financial questions that existed in 1982 have been solved. *See California Ass'n of Physically Handicapped v. FCC*, 778 F.2d 823, 831 n.2 (D.C. Cir. 1985) ("even an FCC decision requiring significantly more programming to be closed-captioned would add an average of only $2,200 to the cost of each hour broadcasting, an amount the ABC network has apparently found to be economically feasible.").

license renewal application of broadcasters in the Los Angeles area "should be denied . . . because they fail to caption a sufficient number of their programs for hearing impaired viewers and refuse to include handicapped persons in EEO programs covering women and minorities." 840 F.2d at 90.

It is thus clear that the "same claim" was not made in the two cases, and CAPH could not have challenged the FCC's rule in the license case since the final rule was still four years in the future. Moreover, the court made no attempt in the license case to review the final rule, nor could it have done so. Indeed, the court recognized that a petition to review the final rule was pending in the Ninth Circuit, *id.* at 93, and that it was for the Ninth Circuit to determine whether the rule did or did not comply with the Rehabilitation Act.

Claim preclusion does not apply when one claim involves rulemaking and the other involves adjudicatory proceeding. *See Greater Los Angeles Council on Deafness v. Baldridge*, 827 F.2d 1353, 1360 (9th Cir. 1987) ("In GLAD I, plaintiff sought promulgation of regulations. . . . In this case plaintiffs seek to compel the Department of Commerce to rule on an administrative complaint. . . . These are separate causes of action which could not have been raised in the previous suit. . . . Thus, we conclude that claim preclusion is inapplicable.").

(ii) Collateral estoppel, or issue preclusion, is also inapplicable because the issue decided in the license case is different than the issue presented in this case. In the license case the issue was whether the Commission should deny license renewal application of a broadcaster

who, in the absence of an FCC rule requiring such action, fails to caption a reasonable portion of its programs or refuses to provide handicapped individuals with equal employment opportunities.

In this case the issues are whether the Commission's licensing and equal employment opportunity programs are "programs or activities" within the meaning of the Rehabilitation Act, and whether the Commission is administering those programs in a discriminatory fashion in violation of the Act. Those issues were not decided in the license case.

2. The Commission violated the Rehabilitation Act when it concluded that "[b]ecause there is no specific requirement in the Communications Act that licensees caption . . . any part of their programming, 26a, it is relieved of its obligation under the Rehabilitation Act to include a captioning requirement in its standards for license eligibility.

In *Alexander v. Choate*, 469 U.S. 287 (1985), the Court assumed, without deciding, that section 504 reaches at least some conduct that has an unjustified disparate impact on individuals with handicaps. The Court analogized section 504 to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), et seq., which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, and explained "that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable to warrant

altering the practices of the Federal grantees that had produced those impacts." *Id.* at 293-94.

After observing that the Rehabilitation Act represented a "national commitment to eliminate the 'glaring neglect' of the handicapped," *id.* at 296, the Court explained that the promises made in the Act "would ring hallow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id.* at 297.

Clearly the FCC's failure to require its licensees to caption a reasonable portion of their programs constitutes discrimination by effect and violates section 504 *if* the assumption made in *Alexander v. Choate* is the law. Equally clearly captioning programs for the nation's millions of hearing-impaired persons is a sufficiently significant social problem, which is readily enough remediable to require the FCC to include a captioning requirement in its standards for license eligibility. *Community Television* itself stated that a licensee, whether commercial or public may not "simply ignore the needs of the hearing-impaired in discharging its responsibilities to the community which it serves." 459 U.S. at 508.

The Commission also committed plain error when it failed to provide in its rule for the administration of its licensing and equal employment opportunity programs in a manner that affords qualified handicapped individuals with equal employment opportunities. The Commission, of course, concedes that it has an EEO program for minorities and women,[8] but concluded that it should not

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[8] This subject is discussed briefly in *Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997, 3003-04 (1990). The Court explained

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include Americans with disabilities in the program because "(1) the public interest standard of the Communications Act [does] not require the adoption of such regulations: (2) the need for such a program [has] not been demonstrated: and (3) [the Commission does] not believe that [it] could effectively administer such a program." 27a.

The Commission's exclusion of disabled people from its EEO program constitutes direct discrimination in violation of the Rehabilitation Act, the prime purpose of which is to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and place such individuals in employment." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984). *See also* The Americans With Disabilities Act, *supra*, § 2(b). When Congress ordered the FCC to promulgate a Section 504 regulation to implement the Rehabilitation Act it imposed on the Commission the obligation to at least attempt to find a way to include disabled individuals in its EEO program.

The discriminatory exclusion of disabled people from the Commission's EEO program also violates the Equal

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that "[r]egulations dealing with employment practices were justified as necessary to enable the FCC to satisfy its obligation under the Communications Act to promote diversity of programming," *id.* at 3003, and that the Department of Justice, "contended that equal employment opportunity in the broadcast industry could contribute significantly toward reducing and ending discrimination in other industries because of the enormous impact which television and radio have upon American life." *Id.* at 3003-04 (citation and internal quote omitted).

Protection Clause of the Fifth Amendment. Congress has determined that classification by handicap should be treated like classification by race, alienage, or national origin. *See* section 2(a)(7) of the Americans With Disabilities Act ("individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.") By this finding Congress has determined that disabled Americans should have their equal protection claims subjected to strict scrutiny, i.e., classifications by handicap "will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

The Court should defer to this finding since Congress is particularly well suited to evaluate the extent to which disabled Americans have been relegated to a position of political powerlessness in our society and the extent to which they have been subjected to a history of purposeful unequal treatment. *See Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. at 3013 ("the special attributes [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions which may be relevant to the resolution of an issue.").

The reasons given by the FCC for exluding disabled people from its EEO program, 27a-28a,[9] are not compelling. Indeed, given the FCC's obligations under the Rehabilitation Act, the Commission's discriminatory EEO program flunks *Cleburne's* rationality test because it is not even reasonably related to a legitimate governmental interest.

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[9] "[T]he Communications Act contains no provision requiring the FCC to adopt regulations governing employment of individuals with handicaps in the broadcasting industry or requiring broadcasters to employ any special procedures for employment of individuals with handicaps. In a rulemaking proceeding, the Commission has considered the question of whether we should adopt regulations governing television stations' employment of individuals with handicaps as we have done for minorities and women. The Commission rejected the idea on the basis that: 1) the public interest standard of the Communications Act did not require the adoption of such regulations: 2) the need for such a program had not been demonstrated: and 3) it did not believe that we could effectively administer such a program. *Broadcast Equal Opportunity Rules, supra,* 76 FCC 2d at 94. The Ninth Circuit Court of Appeals affirmed this decision, concluding that there was no statutory basis in the Rehabilitation Act or Communications Act to extend the Commission's EEO rules to individuals with handicaps and that the Equal Protection Clause of the Constitution also did not require such action. [*California Ass'n of the Physically Handicapped v. FCC,* 721 F.2d 667 (9th Cir. 1983), *cert. denied,* 469 U.S. 832 (1984).]"

CONCLUSION

For the aforesaid reasons the Court should reverse the judgment and hold that the Commission's final order violates the Rehabilitation Act and the Equal Protection Clause of the Fifth Amendment.

Respectfully submitted,

FLEISHMAN, FISHER & MOEST
STANLEY FLEISHMAN
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Counsel for Petitioner

By: STANLEY FLEISHMAN

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, Respondent.	No. 87-7193 F.C.C. No. 87-108 MEMORANDUM* (Filed June 22, 1990)

Appeal from FCC Report, Order and Final Regulation Issued April 15, 1987

Argued and Submitted March 10, 1988
Pasadena, California

Submission Vacated October 7, 1988
Resubmitted June 19, 1990

BEFORE: PREGERSON, WIGGINS, and BRUNETTI, Circuit Judges.

California Association of the Physically Handicapped (CAPH) petitions for review of a Federal Communications Commission (FCC) *Final Report and Order* issued April 15, 1987, adopting rules to implement a 1978 amendment to section 504 of the Rehabilitation Act of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Circuit Rule 36-3.

1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of handicap under any program or activity conducted by any Executive agency. CAPH claims that the FCC rule violates the Communications and Rehabilitation Acts by failing to require all licensees to close caption prime time programs. CAPH also claims that the FCC rule violates the Rehabilitation Act, the Communications Act, and the equal protection clause of the fifth amendment by not implementing an equal employment opportunity program for the handicapped.

I. Closed Captioning

CAPH first alleges that the Rehabilitation Act, 29 U.S.C. § 794, and the Communications Act, 47 U.S.C. § 309(a) compel the FCC to require licensees to close caption all prime-time programming. The Court of Appeals for the District of Columbia's recent opinion, *California Ass'n of the Physically Handicapped, Inc. v. Federal Communications Comm'n*, 840 F.2d 88, 91-95 (D.C. Cir. 1988) (*CAPH IV*), is res judicata as to this issue. *See Community Television v. Gottfried*, 459 U.S. 498, 508-12 (1983). *See also, California Ass'n of the Physically Handicapped, Inc. v. Federal Communications Comm'n*, 721 F.2d 667, 669-70 (9th Cir. 1983), *cert. denied*, 469 U.S 832 (1984) (*CAPH I*).

II. Equal Employment Opportunity Programs for the Handicapped

CAPH next alleges that the Rehabilitation Act, the Communications Act, and the equal protection clause of the fifth amendment compel the FCC to require licensees

to implement equal employment opportunity programs for the handicapped. The district of Columbia's opinion noted above is res judicata as to this issue as well. *CAPH IV,* 840 F.2d at 95-96. *See also CAPH I,* 721 F.2d at 669-70.

Petitioner's Petition for Review is hereby DENIED.

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 84-533

In the Matter of

Amendment of Part 1
of the Commission's Rules
to Implement Section 504
of the Rehabilitation Act
of 1973, as Amended.
29 U.S.C. § 794.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1987; Released: April 15, 1987

By the Commission:

1. This *Report and Order* terminates a proceeding directed at promulgating rules to implement section 504 of the Rehabilitation Act of 1973 (section 504), as amended. 29 U.S.C. 794. Members of the public were requested to comment on all aspects of this proposal.[1]

2. As explained in our *NPRM*, section 504 of the Rehabilitation Act as enacted in 1973 prohibits discrimination on the basis of handicap in federally assisted programs. Neither the Commission nor its licensees are subject to the 1973 legislation.[2] The Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (1978 amendments) extended the nondiscrimination mandate of section 504 to programs and activities conducted by agencies of the Federal Government and the United States Postal Service.[3] The legislative history of the 1978 amendments indicates that

Congress intended the amendments to apply to all federal agencies, including independent regulatory agencies like the FCC.[4] Programs or activities of entities that are licensed or certified by the Commission are not, however, covered by the 1978 amendments or these implementing regulations.[5]

3. Under Executive Order 12250,[6] the Attorney General has authority to coordinate the implementation and enforcement of various nondiscrimination statues, including section 504. To assist agencies in developing rules to implement the 1978 amendments, the Department of Justice drafted prototype regulations which were distributed to affected agencies.[7] As authorized by Executive Order 12067,[8] the Equal Employment Opportunity Commission also reviewed the DOJ prototype. In 1984, the Commission issued an *NPRM* seeking comment on the proposed regulations.

4. After careful consideration of the comments, the Commission has decided to adopt the final rules contained in Appendix B attached hereto. The rules, with minor modifications, conform to the prototype regulations developed by the Department of Justice and approved by the Equal Employment Opportunity Commission.[9] Appendix A contains a section-by-section analysis of the rules and a detailed discussion of the comments received in response to our *NPRM*.[10]

5. Briefly, the rules prohibit discrimination on the basis of handicap in programs or activities conducted by the Federal Communications Commission. The rules thus affect Commission practices with respect to employment,

access to FCC facilities, procurement policies, participation by individuals with handicaps in agency proceedings, and licensing policies for individuals with handicaps. The regulations set forth standards for what constitutes discrimination on the basis of physical or mental handicap, provide definitions for the terms individual with handicaps and qualified individual with handicaps, and establish a complaint mechanism for resolving allegations of discrimination.

6. Section 504 requires that regulations that apply to the programs and activities of the Federal executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been submitted. Within thirty (30) days of the release of this *Order*, the Commission will submit these regulations to the Senate Committee on Education and Labor and its Subcommittee on Education and Labor and its Subcommittee on Selection Education.

7. Pursuant to section 605 of the Regulatory Flexibility Act, 5 U.S.C. § 605, the Commission certified in its *NPRM* that the action proposed will not have a significant impact on a substantial number of small entities. The regulations impose no obligations or requirements upon private entities but place substantive obligations upon the Federal Communications Commission to prohibit discrimination on the basis of handicap in programs or activities it conducts.

8. Copies of this *Report and Order* will be available on tape for those with impaired vision and may be obtained from the Consumer Assistance Office. Office of

Congressional and Public Affairs, Federal Communications Commission, 1919 M Street. N.W., Room 254, Washington, D.C. 20554.

9. Accordingly, IT IS ORDERED That, under the authority contained in sections 4(i) and 303 of the Communications Act, 47 U.S.C. §§ 154(i) and 303, and section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. Part 1 of the Commission's rules is amended, as shown in the attached Appendix B, effective sixty (60) days from the date of publication in the *Federal Register.* IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

10. For further information on this proceeding, contact Sharon B. Kelley, Office of General Counsel, (202) 632-6990 or the Consumer Assistance Office, Office of Congressional and Public Affairs, (202) 632-6999 (TDD) or (202) 632-7260 (VOICE).

The officials responsible for this action are the following Commissioners: Chairman Mark S. Fowler, James H. Quello, Mimi Weyforth Dawson, Dennis R. Patrick, Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

BACKGROUND

The purpose of these final rules is to provide for the enforcement of section 504 of the Rehabilitation Act of

1973, as amended, 29 U.S.C. § 794, as it applies to programs and activities conducted by the Federal Communications Commission. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978. Sec. 119, Pub. L. 95-602, 92 Stat. 2982, and Rehabilitation Act Amendments of 1986. Sec. 103(d), Pub. L. 99-506, 100 Stat. 1810, section 504 of the Rehabilitation Act of 1973 states that:

> No otherwise qualified individual with handicaps in the United States. . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is to submitted to such committees.*

§ 29 U.S.C. 794 (1978 amendment italicized).

The nondiscrimination obligations of the Commission, as set forth in these final rules, are identical, for the most part, to those established by federal regulations for programs or activities receiving federal financial assistance. *See* 28 C.F.R. Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by

supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of federal financial assistance. 124 Cong. Rec. 13901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E 2668, E 2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13897 (remarks of Rep. Brademas); *id.* at 38552 (remarks of Rep. Sarasm).

There are, however, some language differences between these final rules and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeast Community College v. Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. *See Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis (APTA)*, 655 F.2d 1272 (D.C. Cir. 1981); *see also Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

The language of the final regulations is also supported by the recent decision of the Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for individuals with handicaps. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modifications, *see* 469 U.S. 301, and explicitly noted that "[t]he regulations implementing § 504 [for federally assisted programs] are consistent with the view that *reasonable* adjustments in the nature of the benefit

offered must at times be made to assure meaningful success." *Id.* at n. 21 (emphasis added).

Incorporation of these changes, therefore, makes these section 504 federally conducted regulations consistent with the Federal Government's section 504 federally assisted regulations, as interpreted by the Supreme Court. Many of the federally assisted regulations were issued prior to the judicial interpretations of *Davis*, subsequent lower court cases interpreting *Davis*, and *Alexander:* therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, the federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence, the Commission believes that there are no significant differences between these final rules for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

SECTION - BY - SECTION ANALYSIS

Section 1.1601 *Purpose*

Section 1.1601 states the purpose of these rules, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, as it amended section 504 of the Rehabilitation Act of 1973, to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

No comments were received on this section and it remains unchanged from our proposed rules.

Section 1.1602 *Application*

These regulations apply to all programs or activities conducted by the Federal Communications Commission. The programs or activities of entities that are licensed or certified by the Federal Communications Commission are not covered by these regulations.

In its comments, CLSP objected to the phrase "[t]o the extent authorized by law and not inconsistent with the Commission's law enforcement responsibilities," as used in our proposed rules. They argued that because this phrase does not "provide a meaningful articulation of intent" under the Administrative Procedure Act, it does not put licenses "on notice as to how the FCC plans to apply section 504." To resolve this issue, the Commission has omitted this phrase from its final regulations.

Comments which objected to the statement that these rules do not affect entities that are licensed or certified by the Commission are addressed in the discussion of section 1.1630, *infra*.

Section 1.1603 *Definitions*

"Assistant Attorney General." "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the Commission's programs or activities. The definition provides examples of commonly used auxiliary aids. Auxiliary aids are

addressed in section 1.1660(a)(1). Comments on the definition of "auxiliary aids" are discussed in connection with that section.

In its comments, PVA suggested that the Commission change the name of this section to "Aids for reasonable accommodation," because the term "auxiliary aids" implies "something that is extra or discretionary." To avoid confusion in terminology, however, the Commission has declined this proposal and adopted the language in the DOJ prototype and final regulations. CLSP noted that auxiliary aids are required explicitly only by section 1.1660(a)(1), the section involving communications, and suggested that the Commission's rules should specify that auxiliary aids should include aids for the physically impaired, such as attendant services. The Commission will not adopt this proposal, *see* discussion, *infra*, of section 1.1660.

"Commission." For purposes of these regulations "Commission" means the Federal Communications Commission.

"Complete complaint." The definition of "complete complaint" means all the information necessary to enable the Commission to investigate the complaint and enables the Commission to determine the beginning of its obligation to investigate a complaint (*see* section 1.1670(d)).

"Facility." The term "facility" is used in sections 1.1649, 1.1650 and 1.1651(f). The definition of "facility" is similar to that in the section 504 coordination regulations for federally assisted programs, 28 C.F.R. § 41.3(f), except that the term "rolling stock or other conveyances" has

been added and the phrase "or interest in such property" has been deleted to clarify its coverage.

In its comments, MSCH objected to the omission of the phrase "or interest in such property" from the definition of "facility." As explained in the section-by-section analysis of our *NPRM*, the term "facility," as used in these regulations, refers to structures and does not include intangible property rights. This phrase has been omitted from the Commission's final rules because the requirement would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. However, we emphasize that these regulations apply to all regulations and programs conducted by the Commission regardless of whether the facility in which they are conducted is owned, leased or used on some other basis by the Commission.

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulations for federally assisted programs (28 C.F.R. § 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicated that no substantive change was intended. Thus, although the term has been changed in these final regulations to the consistent with the statute as amended, the definition is unchanged. In particular, even though the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

In its comments, MSCH suggested that the Commission's rules should include specific examples under the definition for "physical and mental impairment" because they are "illustrative and serve to clarify." This is unnecessary because section 1.1603 of our proposed rules already contains specific examples and it remains unchanged in our final rules.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 C.F.R. § 41.32).

CLSP and PVA disagreed with our definition of "qualified handicapped person." Specifically, CLSP urged the Commission to: 1) eliminate the "fundamental alteration" limitation now present in the definition of "qualified handicapped person" and 2) eliminate the requirement that the disabled person achieve the purpose of the program or activity. Both CLSP and OPAHDD suggested that the Commission's final rules incorporate the requirement that reasonable accommodation be made in determinations on whether a particular individual meets the essential eligibility requirements. Essentially, these commenters are suggesting that we adopt the same definition as that of "qualified handicapped person" found in the federally assisted rule.

We emphasize, however, that paragraph (1) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform

services or to achieve a level of accomplishment. In such programs, a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the Commission can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410.

It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *Id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

We have thus incorporated the *Davis* Court's language in the definition of "qualified individual with handicaps" in order to make clear that an individual with handicaps must be able to participate in the program offered by the Commission. The Commission is required to make modifications in order to enable an applicant

with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the Commission does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The Commission has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the Commission must follow the procedures established in section 1.1650(a) and 1.1660(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the Managing Director in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the Managing Director determines that an action would result in a fundamental alteration, the Commission must consider options that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration. For programs or activities that do not fall under the first paragraph, paragraph (2) adopts the existing definition of "qualified individual with handicaps" with respect to

services (28 C.F.R. § 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is one who meets the essential eligibility requirements for participation in the program or activity.

A new paragraph (4) has been added to make clear that "qualified individual with handicaps" is defined for purposes of employment in 29 C.F.R. § 1613.702(f), which is made applicable to this part by section 1.1640. Nothing in this part changes existing regulations applicable to employment.

"Section 504." This definition makes clear that, as used in these regulations, "section 504" applies only to programs or activities conducted by the Commission.

Section 1.1610 *Self-evaluation*

The section requires that the Commission conduct a self-evaluation of its compliance with section 504 within one year of the effective date of these regulations. The self-evaluation requirement is present in the existing section 504 coordination regulations for programs or activities receiving Federal financial assistance (28 C.F.R. § (b)(2)).

The final rules use the same provision adopted by the Department of Justice in its final rules implementing section 504 for its federally conducted programs. *See* 28 C.F.R. § 39.110. The Department of Justice determined that this regulatory language was appropriate after it had analyzed the Federal Advisory Committee Act, 5 U.S.C. app., Executive Order 12024, and 41 C.F.R. Part 101-6, the

regulations of the General Services Administration implementing the Act.

The final rules provide that the Commission shall provide an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and development of transition plans, *see* section 1.1650(d), by submitting comments (both oral and written).

CLSP was in favor of the requirement in this section of our proposed rules that the Commission maintain a list of interested persons consulted. However, retention of this requirement is unnecessary since, in the final rules, all those interested in the conduct of the Commission's self-evaluation will have an opportunity to submit written comments that will be available for public inspection.

In addition to the self-evaluation and notice provisions, PVA recommended that the Commission consider including the following in its final rules: 1) an assurance to be submitted by the Commission with its self-evaluation that the effects of the discriminatory policy will be eliminated; 2) a transition plan for compliance; and 3) specific modification requirements, especially those that affect persons with impaired vision and hearing. We think it is unnecessary to include these provisions in the rules. The very purpose of the self-evaluation procedure is to enable the agency to improve its responsiveness to the needs of individuals with handicaps in full compliance with this purpose, we intend to take all necessary and appropriate measures to correct any deficiencies disclosed by the self-evaluation process. In addition,

depending upon the circumstances, such measures may well include provisions for "transition plans" and other programs suggested by the commenters.

Section 1.1611 ***Notice***

Section 1.1611 requires the Commission to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by the 1978 amendments to section 504 and these regulations. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the Commission's programs and activities, the display of informative posters in service centers and other public places, or the broadcast of information by television or radio.

CLSP indicated in its comments that this list of methods of providing information "is very helpful" and recommended that the Commission's regulations specifically require that information "effectively" apprise persons of their rights and protections against discrimination. According to CLSP, the addition of this language will ensure that the Commission will test the methods that it selects to accomplish the purposes of notification and take action that will have the desired impact. The Commission believes it is unnecessary to include this language change in the rules. The self-evaluation process, *see* section 1.1610, should ensure that Commission policies implementing the 1978 amendments are effective.

PVA suggested that "[n]otification of Commission policy regarding nondiscrimination should also be specifically distributed in recruitment materials." While we think this is an excellent suggestion, incorporation of this requirement in the final rules is unnecessary since the following statement is currently contained in item 16 of all Commission vacancy announcements: "all candidates will be considered without regard to political affiliation, marital status, race, color, sex, national origin, *nondisqualifying physical or mental handicap*, age, or other nonmerit factor (emphasis added)." *See* FCC Form A-179-A (January 1986). A similar statement is also included in all paid advertising for employment at the Commission.

Section 1.1630 ***General prohibitions against discrimination***

Section 1.1630 is an adaptation of the corresponding section of the section 504 coordination regulations for programs or activities receiving Federal financial assistance (28 C.F.R. § 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in section 1.1630 establish the general principles for analyzing whether any particular action of the Commission violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the Commission violates a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in section 1.1630. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The Commission may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its programs simply because the individual is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of individuals with handicaps (*e.g.*, epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. In its comments, MSCH stated that the use of an irrebuttable presumption is "never" justified and questioned the expertise of those who would make these decisions. The Commission believes that the use of an irrebuttable presumption is permissible only in extremely limited circumstances, such as when a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (sections 1.1649-1.1651) and communications (section 1.1660) are specific applications of this principle. Despite the mandate of paragraph (d) that the Commission administer its programs and activities in the most integrated

setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the Commission to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the Commission's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the Commission from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board. Paragraph (b)(1)(vi) prohibits the Commission from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the Commission from utilizing criteria or methods of administration that deny individuals with handicaps access to the Commission's programs or activities. The phrase "criteria or methods of administration" refers to official written Commission policies and the actual practices of the Commission. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that

are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in section 1.1630(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the Commission. Although MSCH disagreed with the interpretation that paragraph (b)(4) does not apply to construction of additional buildings at an existing site, this interpretation conforms to DOJ guidelines concerning the prototype regulations, and we think it is reasonable.

Paragraph (b)(5) prohibits the Commission, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (b)(6) prohibits the Commission from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification. A person is a "qualified handicapped person" with respect to licensing or certification, if he or she can meet the essential eligibility requirements for receiving the license or certification (*see* section 1.1603).

In addition, the Commission may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis or handicap. For example, the Commission must comply with these nondiscrimination requirements when establishing safety standards for the operations of licensees. Thus, the Commission must ensure that standards that it promulgates

do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations.

CLSP, CAPH and PVA disagreed with our statement that the 1978 amendments do not extend the nondiscrimination mandate of section 504 to the programs or activities of entities that are licensed or certified by the Commission. Specifically, they argued that broadcast licensees are subject to the 1978 amendments. Although the 1978 amendments extended the section 504 nondiscrimination mandate to "any program or activity conducted by an Executive agency," the programming or activity of a broadcaster licensed by the Commission is not a "program or activity conducted by" the Commission itself and is thus unaffected by the 1978 amendments. *See* 124 Cong. Rec. 13901, 38551 (1978) (remarks of Rep. Jeffords, author of the 1978 amendments). DOJ's final regulations and the most recent DOJ approved joint publication of regulations to enforce the 1978 amendments to section 504 specifically acknowledge that

"[s]ection 504 does not of itself extend an agency's regulatory authority to the activities of licensees or certified entities." *See* 49 Fed. Reg. at 35728: 51 Fed. Reg. at 22884.

In addition, according to PVA, the Commission is "empowered with broad authority to regulate the communications industry, especially where it 'would be consistent with the public interest.' " citing *U.S. v. Southwestern Cable*, 392 U.S. 158, 167-68 (1968). PVA therefore concluded that the Commission has "a duty to ensure that the licensee, as a public trustee, acts in the public interest and does not discriminate against handicapped persons."

Similarly, CAPH argued that these regulations should extend to the activities broadcast licensees because regulating them is the primary activity of the Commission under sections 301 and 303 of the Communications Act, 47 U.S.C. §§ 301, 303. Specifically, CAPH suggested that broadcast licensees should be required to provide closed-captioning for the hearing-impaired and equal employment opportunities to their employees with handicaps similar to those afforded minorities and women. CLSP recommends that the Commission delete the language in section 1.1602 that exempts licensees from the scope of these regulations and publish a second *NPRM* in which the government articulates the manner in which it proposes to apply section 504 to its licensees.

Although the proposals made by PVA and CAPH would clearly be beyond the scope of this proceeding, we note that these same arguments have been raised repeatedly before the Commission, the courts of appeals and the Supreme Court and have been rejected in every

instance as without legal basis. *See, e.g., License Renewal Applications – Los Angeles,* 69 FCC 2d 451 (1978), *reconsid. denied,* 72 FCC 2d 273 (1979), *aff'd in part and vacated in part. Gottfried v. FCC,* 210 U.S. App. D.C. 184, 655 F.2d 297 (1981), *rev'd in part, Community Television of Southern Calif. v. Gottfried,* 459 U.S. 498 (1983) and *cert. denied, Gottfried v. FCC,* 454 U.S. 1144 (1982). *See also In re: Amendment of Broadcast Equal Opportunity Rules and FCC Form 395,* 76 FCC 2d 86 (1980), *reconsid. denied,* 80 FCC 2d 299 (1980), *aff'd, California Ass'n of the Physically Handicapped (CAPH) v. FCC,* 721 F.2d 667 (9th Cir. 1983), *cert. denied,* 469 U.S. 832 (1984), *aff'g, California Paralyzed Veteran's Ass'n v. FCC,* 496 F. Supp. 125 (C.D. Cal. 1980). In *Gottfried, supra,* the Supreme Court concluded that Congress had not "intended the Rehabilitation Act of 1983 to impose any new enforcement obligations on the Federal Communications Commission." 459 U.S. at 509. The Court stated that the public interest standard of the Communications Act was insufficient to create any obligations to enforce section 504 or incorporate that section's standards with the Communications Act, 459 U.S. at 509, n. 14.

Because there is no specific requirement in the Communications Act that licensees caption all or any part of their programming, the Commission has concluded that, except for emergency messages, the general public interest standard of the Communications Act does not require captioning by licensees. *See generally, Use of Telecasts to Inform and Alert Viewers with Impaired Hearing,* 26 FCC 2d 917 (1970); *Captioning of Emergency Messages,* 61 FCC 2d 18 (1976), *modified on reconsid.,* 62 FCC 2d 565 (1977);

Captioning for the Deaf, 41 Fed. Reg. 5834 (1976); *Captioning for the Deaf*, 63 FCC 2d 378 (1976); *Teletext Transmissions*, 53 P&F 2d 1309, 1315-16, 1328-29 (1983), *reconsid. denied*, 57 P&F 2d 842 (1985), *pet. for reh. denied, TRAC v. FCC*, 806 F.2d 1115 (D.C. Cir. 1986), *petition for cert. filed*, No. 86-1371 (February 20, 1987). Although the Commission has encouraged captioning and has adopted rules to facilitate the development and implementation of captioning technology, it has concluded that because of technological and financial problems, it should rely on voluntary initiatives in this area except with respect to emergency announcements.

In addition, the Communications Act contains no provision requiring the FCC to adopt regulations governing employment of individuals with handicaps in the broadcasting industry or requiring broadcasters to employ any special procedures for employment of individuals with handicaps. In a rulemaking proceeding, the Commission has considered the question of whether we should adopt regulations governing television stations' employment of individuals with handicaps as we have done for minorities and women. The Commission rejected the idea on the basis that: 1) the public interest standard of the Communications Act did not require the adoption of such regulations: 2) the need for such a program had not been demonstrated: and 3) it did not believe that we could effectively administer such a program. *Broadcast Equal Opportunity Rules, supra*, 76 FCC 2d at 94. The Ninth Circuit Court of Appeals affirmed this decision, concluding that there was no statutory basis in the Rehabilitation Act or Communications Act to extend the Commission's EEO rules to individuals with handicaps and that the

Equal Protection Clause of the Constitution also did not require such action. *CAPH v. FCC, supra,* 721 F.2d at 667.

PVA suggested that this part be revised to be consistent with the federally assisted rule, which includes a prohibition on federal agencies providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap. The Commission did not adopt this suggestion. Not only would this provision be inappropriate in regulations applying only to federally conducted programs or activities, but it is clearly inapplicable to the FCC, which is not a "funding agency." *See Gottfried, supra.*

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d) provides that the Commission must administer programs and activities in the most integrated setting appropriate to the needs of the qualified individuals with handicaps.

Section 1.1640 *Employment*

Section 1.1640 prohibits discrimination on the basis of handicap in employment by the Commission. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris,* 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith v. United States Postal Service,* 742 F.2d 257, 259-60 (6th Cir. 1984); *Prewitt v. United States Postal Service,* 662 F.2d 292,

302-04 (5th Cir. 1981); *Contra McGuiness v. United States Postal Service*, 744 F.2d 1318, 1320-21 (7th Cir. 1984); *Boyd v. United States Postal Service*, 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304. Accordingly, section 1.1640 (Employment) of these rules, adopts the definitions, requirements, and procedures of section 501 as established in regulations, of the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. Part 1613. In addition, section 1.1670(b) specifies that the Commission will use the existing EEOC procedures to resolve allegations of employment discrimination. These final rules have not been changed except that a reference to the Equal Employment Opportunity Commission has been added. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 C.F.R. 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap.

In its comments, MSCH argued that this whole section needs clarification because no reference is made to recruitment and hiring, making reasonable accommodation and review of pre-employment examinations, inquiries and tests. While this rule could define terms

with respect to employment and enumerate what practices are covered and what requirements apply, the Commission has adopted EEOC's recommendation that to avoid duplicative, competing or conflicting standards with respect to Federal employment, reference in these regulations to the government-wide EEOC rules is sufficient. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 1.1649 ***Program accessibility: Discrimination prohibited***

Section 1.1649 states the general nondiscrimination principle underlying the program accessibility requirements of section 1.1650 and 1.1651.

Section 1.1650 ***Program accessibility: Existing facilities***

These regulations adopt the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving federal financial assistance (28 C.F.R. §§ 41.56-41.58), with certain modifications. Thus, section 1.1650 requires that the Commission's program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. These regulations also make clear that the Commission is not required to make each of its

existing facilities accessible (section 1.1650(a)(1)). However, section 1.1650, unlike 28 C.F.R. §§ 41.56-41.57, places explicit limits on the Commission's obligation to ensure program accessibility (section 1.1650(a)(2)).

In their comments to this section, MSCH and CLSP suggested that the Commission has misinterpreted the *Davis* decision. Paragraph (a)(2) generally codifies recent case law that defines the scope of the Commission's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the Commission is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in section 1.1660(d). This provision is based on the Supreme Court's holding in *Southeastern Community College v. Davis*, § 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. *See, e.g., Dopico v. Goldschmidt, supra; American Public Transit Association v. Lewis (APTA), supra.*

This interpretation is also supported by the Supreme Court's recent decision in *Alexander v. Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage

under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on individuals with handicaps. The Court assumed, without deciding, that section 504 reaches at least some conduct that has an unjustifiable disparate impact on individuals with handicaps, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation (*Id.* at 299).

Relying on *Davis*, the Court said that section 504 guarantees qualified individuals with handicaps "meaningful access to the benefits that the grantee offers" (*Id.* at 301) and that "*reasonable adjustments* in the nature of the benefit being offered must at times be made to assure meaningful access." *Id.* at n. 21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments', or 'modifications' to existing programs that would be 'substantial' . . . or that would constitute 'fundamental alteration(s) in the nature of the program' " (469 U.S. at 300, n. 20) (citations omitted).

Alexander supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations, certain accommodations for an individual with handicaps may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of these regulations or reversal of a particular enforcement action taken pursuant to these regulations. This provision is therefore unchanged from the proposed rules.

In their comments, EPVA and PVA asserted that the holding in *Davis* that the plaintiff was not a qualified individual with handicaps and that the subsequent reference to "undue financial and administrative burdens" was mere *dicta*. This view overlooks the interpretations of *Davis* provided by the Federal circuit court cases mentioned above. The *APTA* and *Dopico* decisions make it clear that financial burdens can limit the obligation to comply with section 504. *See also New Mexico Association for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982). In addition, the Court in *Alexander* held that the "administrative costs" of subjecting any action affecting Medicaid recipients to a detailed analysis of its effects on an individual with handicaps "would be well beyond the accommodations that are required under *Davis*." 469 U.S. at 308.

In its comments, PVA expressed difficulty with the undue burdens defense, based on the assumption that the Commission's regulations are substantively inconsistent with the regulations for federally assisted programs. This assumption is incorrect. Judicial interpretations have established that neither section 504 nor the regulations for federally assisted programs establish an unlimited obligation to modify programs or activities to accommodate individuals with handicaps.

It has been argued that *APTA* is no longer good law, in view of the Supreme Court's decision in *Consolidated Rail Corp. v. Darrone (Conrail)*, 465 U.S. 624 (1984), in which the Court said that Congress intended, through the 1978 amendments to the statute, to codify the HEW regulations. It has also been suggested that *Conrail* prohibits departures from the language of the federally assisted

regulations. The *Conrail* decision addressed only the question of employment coverage under the Statute and cannot be read to mean that Congress "codified" other parts of the regulations. Furthermore, the undue burdens defense is not inconsistent with the HEW regulations; in fact, the employment provisions of the HEW regulations – those addressed in *Conrail* – do include an "undue hardship" defense. This position is confirmed by the Supreme Court's decision in *Alexander*. There the Court referred to its previous recognition in *Conrail* of the regulations as "an important source of guidance on the meaning of § 504." *Alexander*, 469 U.S. at 304, n. 24, and at the same time, as discussed above, emphasized that section 504 does not mandate extensive costs and administrative burdens.

The Commission is adopting the language in its proposed rules relating to procedural requirements for application to the "fundamental alteration" and "undue financial and administrative burdens." The Commission believes, that, in most cases, making a Commission program accessible will not result in undue burdens. In determining whether financial and administrative burdens are undue, all Commission resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with section 1.1650(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the Commission. The decision that compliance would result in such alteration or burdens must be made by the Commission's Managing Director and

must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Managing Director's decision or failure to make a decision may file a complaint under the compliance procedures established in section 1.1670. Finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the Commission must still take action, short of that outer limit, that will open participation in the Commission program to individuals with handicaps to the fullest extent possible.

EPVA, PVA and CLSP also argued that the decision that an action would result in undue burdens should be based on the resources of the Commission as a whole. The Commission believes that its entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Parts of the Commission's budget may be earmarked for specific purposes and are simply not available for use in making the Commission's programs accessible to individuals with handicaps. In its comments, MSCH suggested that the Commission should substitute the more specific, positive and less discriminatory term "undue hardship" for "burden". To avoid creating unnecessary confusion as to terminology, the Commission declined to make this change. In its comments, CLSP suggested that the Commission's regulations, like the Department of Labor's regulations, should specifically provide for input from the applicant beneficiary on the question of costs, funding and resources, based on the rationale that the person to be

accommodated is often the best source of information for developing effective and low-cost accommodations. The Commission believes it is unnecessary to adopt this as part of its final regulations; we fully expect that persons requesting services will make their views known, and, in cases of adverse decisions by the Managing Director, they will have a full opportunity to challenge his decisions through the complaint process.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible building, and provision of aides. In choosing among methods, the Commission shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the Commission's program accessible. The Commission may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 C.F.R. 41.57(b), the Commission must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of these regulations. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of these regulations.

Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 1.1651 ***Program accessibility: New construction and alterations***

Overlapping coverage exists with respect to new construction under section 504, section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 792), and the Architectural Barriers Act of 1968, as amended (42 U.S.C. §§ 4151-4157). Section 1.1651 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 C.F.R. §§ 101-19.600 to 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. §§ 4151-4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to these regulations are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

MSCH took issue in its comments with the fact that existing buildings leased by the Commission after the effective date of these regulations are not required by these regulations to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in section 1.1650. To the extent the buildings are newly

constructed or altered, they must also meet the new construction and alteration requirements of section 1.1651.

In any event, Federal practice under section 504 has always treated newly leased buildings as subject to existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting as the use of an existing Federal facility, and the Commission believes the same accessibility standard should apply to both owned and leased existing buildings.

In *Rose v. United States Postal Service*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of the issue. In its comments, CLSP suggested that, in accordance with *Rose*, the Commission's final regulations should clarify that "leased buildings are required to comply with the Architectural Barriers Act . . . [in order to] reflect an accepted practice and prevent confusion about the reach of the Barriers Act." We believe it more appropriate, however, to provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 1.1660 *Communications*

Section 1.1660 requires the Commission to take appropriate steps to ensure effective communication with

personnel of other federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under section 1.1660(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, the Commission's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the Commission (section 1.1660 (a)(1)(i)). The Commission shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under section 1.1660(d). That paragraph limits the obligation of the Commission to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see section-by-section analysis of section 1.1650(a)(2), supra*). Unless not required by section 1.1660(d), the Commission shall provide auxiliary aids at no cost to the individual with handicaps.

In their comments, CLSP and PVA suggested that the definition of auxiliary aids should include attendant services that may be needed to aid individuals with handicaps to travel to meetings. Like the Department of Justice, the Commission declined to adopt this proposal on the basis that such services are generally personal in nature and not directly related to the federally conducted programs. To the extent that the services of an attendant are not directly related to a federally conducted program or activity, it would be inappropriate to require them at Federal expense. *See* 491 Fed. Reg. 35732 (1984)

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.*, a meeting) where the hearing-impaired applicant or participant is not skilled in spoken or written language. Then, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the Commission intends to make clear to the public: (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities; (2) that an individual with handicaps may request a particular mode of communication; and (3) the Commission's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

In its comments, CLSP commended the Commission's efforts to encourage captioning and recommended that the Commission add a provision to this section of its regulations that "[t]he agency shall make efforts to provide captioning for hearing-impaired people in training films and video tapes." Although captioning is an option that the Commission may choose, our reliance on an alternative, effective method of communication; *i.e.*, sign language interpreters, would be consistent with this section of our regulations, the DOJ prototype and final regulations. Therefore, the Commission did not adopt this proposal.

The Commission shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the Commission. Auxiliary aids must be afforded where necessary to ensure effective communication at these proceedings. When sign language interpreters are necessary, the Commission may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (section 1.1660(a)(i)(ii)). For example, the Commission need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly, these regulations do not require the Commission to provide wheelchairs to persons with mobility impairments. In its comments, MSCH suggested adding the following language to section 1.1660 of the Commission's rules: "[i]t is always advisable to have a number of wheelchairs on hand to accommodate a disabled or elderly or weary person." The Commission will not adopt this suggestion as part of its final regulations; however, the Commission has a wheelchair available for emergency situations in the office of its public health nurse.

Paragraph (b) requires the Commission to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the Commission to provide signage at inaccessible facilities that directs users to locations with information about accessible facilities.

Section 1.1670 *Compliance procedures*

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints Paragraph (b) provides that the Commission will process employment complaints according to procedures established in existing regulations of the EEOC (29 C.F.R. Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791).

In its comments, CLSP noted that the Commission's "proposed rules fail to inform complainants of the address to which complaints should be sent."

We have adopted this suggestion in the Commission's final regulations. The Commission's Managing Director shall be responsible for coordinating implementation of this section (section 1.1670(e)). Complaints may be sent to the Handicapped Coordinator, Office of Managing Director, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

The Commission is required to accept and investigate all complete complaints (section 1.1670(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government (section 1.1670(c)).

In its comments, CLSP proposed that the Commission's rules should provide that any complainant who files an incomplete complaint will be notified within thirty (30) days of receipt of the incomplete complaint that additional information is needed. If the complainant

fails to complete the complaint within thirty (30) days of receipt of such notice, the Commission shall dismiss the complaint without prejudice. This is fully consistent with the Department of Justice's final regulations. *See* 28 C.F.R. § 39.170(f)(2). The Commission adopted this suggestion in this section of its final regulations.

CLSP also suggested in connection with the compliance procedures suggested that the Commission should be required to refer a complaint to the appropriate agency when it does not have jurisdiction over it. The proposed rules merely required the Commission to make reasonable efforts to do so. The Commission has not adopted this suggestion because of several possible circumstances in which the Commission might not be able to successfully refer a complaint. For example, the Commission might receive a complaint that no Federal agency would have jurisdiction over or that did not contained sufficient information to identify the appropriate agency.

In addition, CLSP proposed that once the Managing Director has decided that a specific accommodation cannot be provided, like the Department of Labor's regulations, this decision should be made to represent the Commission's final decision so that the applicant or beneficiary can proceed directly to court to challenge the Managing Director's decision. The Commission has not adopted this approach because we believe it is based on a faulty premise. The Commission does not find it "unlikely" that an administrative appeal of this decision will produce a different result. Indeed, the Commission has, on numerous occasions, reversed the decisions made by its Review Board and the various Bureau and Office Chiefs, and firmly rejects the suggestion that it would

"rubber-stamp" any of these decisions. As a result, this section of our final rules will remain consistent with the Department of Justice prototype.

Paragraph (f) requires the Commission to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the Commission to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (section 1.1670(g)). One appeal within the Commission shall be provided (section 1.1670(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (section 1.1670(i)).

Paragraph (l) permits the Commission to delegate its authority for investigating complaints to other federal agencies. However, the statutory obligation of the Commission to make a final determination of compliance or noncompliance may not be delegated.

PVA also suggested that this section of the Commission's rules include a specific provision for judicial review. CLSP expressed concern that the existence of an internal compliance procedure somehow curtails the complainant's right to a *de novo* review. In their final regulations, the Department of Justice addressed this argument as follows:

> It is beyond our jurisdiction to specify that *de novo* review is available to complainants seeking judicial review of final agency decisions. This issue is for the courts to decide. That is also true for the issue of the availability of a private right of action, either without invoking our compliance procedures or after the issuances of letters of findings.

See 49 Fed. Reg. at 35733. Accordingly, the Commission does not include a specific provision for judicial review in its final regulations.

PVA also suggested that this section include: 1) a provision to ensure that all other regulation forms and directives by the FCC are superseded by the nondiscrimination requirement of this regulation; 2) a provision for the availability of attorneys fees in administrative proceedings; and 3) a provision for the availability of compensation to the prevailing party. The Commission believes that forms and directives can be more appropriately dealt with through internal guidelines. With respect to attorneys' fees, the Commission agrees with the Department's finding that "[n]othing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment." *Id.* at 35733. Similarly, the statute does not provide for compensation to prevailing parties, and we will not include such a provision in the regulations.

APPENDIX B

FINAL RULES

Part 1, Subpart L – ENFORCEMENT OF NON-DISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL COMMUNICATIONS COMMISSION

Sec.

1.1671-1699 [Reserved]

Authority 29 U.S.C. § 794

1.1601 *Purpose*

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

1.1602 *Application*

This part applies to all programs or activities conducted by the Federal communications Commission. The programs or activities of entities that are licensed or certified by the Federal communications Commission are not covered by these regulations.

1.1603 *Definitions*

For purposes of this part, the term –

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Commission. For example, auxiliary aids useful for

persons with impaired vision include readers. Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, note-takers, written materials, and other similar services and devices.

"Commission" means Federal Communications Commission.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the Commission's alleged discriminatory action in sufficient detail to inform the Commission of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicap" means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *"Physical or mental impairment"* includes –

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemio and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *"Major life activities"* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *"Has a record of such an impairment"* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *"Is regarded as having an impairment"* means –

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Commission as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the Commission as having such an impairment.

"Qualified individual with handicaps" means –

(1) With respect to any Commission program or activity under which an individual is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Commission can demonstrate would result in a fundamental alteration in its nature; and

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) *"Qualified handicapped person"* as that term is defined for purposes of employment in 29 C.F.R. § 1613.702(f), which is made applicable to this part by section 1.1640.

"Section 504" means section 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394, 29 U.S.C. § 794, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1617, and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955, and the Rehabilitation Act Amendments of 1986. Sec. 103(d).

Pub. L. 99-506, 100 Stat. 1810. As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

1.1604-1609 [Reserved]

1.1610 *Self-evaluation*

(a) The Commission shall, within one year of the effective date of this part evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Commission shall proceed to make the necessary modifications.

(b) The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Commission shall, until three years following completion of the self-evaluation, maintain on file and make available for public inspection –

(1) a description of areas examined and any problems identified; and

(2) a description of any modifications made.

1.1611 *Notice*

The Commission shall make available to employees, applicants, participants, beneficiaries, and other

interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Commission, and make such information available to them in such manner as the Managing director finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and these regulations.

1.1612-1629 [Reserved]

1.1630 ***General prohibitions against discrimination***

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

(b)(1) The Commission, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of handicap –

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to

gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Commission may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Commission may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would –

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Commission may not, in determining the site or location of a facility, make selections, the purpose or effect of which would –

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Commission; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Commission, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The Commission may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Commission establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Commission are not, themselves, covered by this part.H

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive

order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Commission shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§1.1631-1639 [Reserved]

§1.1640 *Employment*

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Commission. The definitions, requirements and procedures of Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 501, as established by the Equal Employment Opportunity Commission in 29 C. F. R. Part 1613, as well as the procedures set forth in the Basic Negotiations Agreement Between the Federal Communications Commission and National Treasury Employees Union (effective June 22, 1982) and Subchapter III of the Civil Service Reform Act of 1978, 5 U.S.C. § 7121(d), shall apply to employment in federally conducted programs or activities.

§ 1.1641-1648 [Reserved]

1.1649 *Program accessibility: Discrimination prohibited*

Except as otherwise provided in section 1.1650, no qualified individual with handicaps shall, because the Commission's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

§ 1.1650 *Program accessibility: Existing facilities*

(a) *General.* The Commission shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not –

(1) Necessarily require the Commission to make each of its existing facilities accessible to and usable by individuals with handicaps.

(2) Require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with section 1.1650(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Managing director after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The Commission may comply with the requirements of this section through such means as

redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The Commission is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Commission, in making alternations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. §§ 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Commission shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The Commission shall comply with the obligations established under this section within sixty (60) days of the effective date of this part except that where structural changes in facilities are undertaken, such changes, shall be made within three (3) years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Commission shall develop, within

six (6) months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes.

The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum –

(1) Identify physical obstacles in the Commission's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe the detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one (1) year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan.

1.1651 *Program accessibility: New construction and alterations*

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements and standards of the Architectural Barriers Act, 42 U.S.C.

§§ 4151-4157, as established in 41 C.F.R. §§ 101-19.600 to 101-19.607, apply to buildings covered by this section.

§ 1.1652-1659 [Reserved]

§ 1.1660 *Communications*

(a) The Commission shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other federal entities, and members of the public.

(1) The Commission shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Commission.

(1) In determining what type of auxiliary aid is necessary, the Commission shall give primary consideration to the requests of the individual with handicaps.

(a) The Commission need not provide individually prescribed devises, readers for personal use or study, or other services of a personal nature.

(2) Where the Commission communicates with applicants and beneficiaries by telephone, telecommunications devices for deaf persons (TDD's) or equally effective telecommunications systems shall be used.

(b) The Commission shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Commission shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that Compliance with section 1.1660 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Managing Director after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

1.1661-1669 [Reserved]

1.1670 *Compliance procedures*

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 C.F.R. Par 1613 pursuant to section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791.

(c) The Managing Director shall be responsible for coordinating implementation of the section. Complaints may be sent to the Handicapped Coordinator, Office of Managing Director, Federal Communications Commission, 1919 M Street, N.W. Room 852, Washington, D.C. 20554.

(d) *Acceptance of Complaint*

1) The Commission shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within one-hundred eighty (180) days of the alleged act of discrimination. The Commission may extend this time period for good cause.

2) If the Commission receives a complaint that is not complete, the complainant will be notified within thirty (30) days of receipt of the incomplete complaint that additional information is needed. If the complainant fails to complete the complaint within thirty (30) days of receipt of this notice, the Commission shall dismiss the complaint without prejudice.

(c) If the Commission receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The Commission shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §§ 4151-4157, is not readily accessible to and usable by individuals with handicaps.

(g) Within one-hundred eighty (180) days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the investigation in a letter containing –

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within ninety (90) days or receipt from the Commission of the letter required by section 1.1670(g). The Commission may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Office of the Secretary, Federal Communications Commission, 1919 M Street N.W. Room 202, Washington, D.C. 20554.

(j) The Commission shall notify the complainant of the results of the appeal within sixty (60) days of the receipt of the request. If the Commission determines that it needs additional information from the complainant, it shall have sixty (60) days from the date it receives the additional information to make the determination on the appeal.

(k) The time limits cited in (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The Commission may delegate its authority for conducting complaint investigations to other federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§ 1.1671-1699 [Reserved]

FOOTNOTES

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[1] *See Notice of Proposed Rule Making (NPRM)*, 50 Fed. Reg. 35262 (1984).

[2] In *Community Television of Southern California v. Gottfried*, 459 U.S. 498 (1983), the Supreme Court held that the Federal Communications Commission is not funding agency and therefore has no responsibility to enforce the section 504 non-discrimination mandate with respect to federally assisted programs.

[3] Par. 1 No. 95-602 119, 92 Stat. 2982 (1978).

[4] No. 124 Cong. Rec. 13.9001 (1978) (remarks of Rep. Jeffords the sponsor); 124 Cong. Rec. E 2668, E. 2670 (daily ed. May 17, 1978) *at* 124 Cong. Rec. 13.897 (remarks of Rep. Brademas) remarks of Rep. Sarasm.

[5] *See* section 1.1602 of the Commission's rules and the discussion of section 1.1630(b)(6) in the section-by-section analysis contained in Appendix B.

[6] 45 Fed. Reg. 72995,3 C.F.R. 1980 Comp., p. 298

[7] The DOJ prototype generally parallels the non-discrimination obligations established by federal regulation for "federally assisted programs" *See* para. 2. *supra*; 25 C.F.R.Part 41 (section 504 coordination regulation for federally assisted programs)

[8] 43 Fed. Reg. 28967,3 C.F.R. 1978 Comp. p. 206

[9] *See* DOJ's final regulations at 49 Fed. Reg. 35724 (1984); Joint Publication of twenty Federal agencies at 51 Fed. Reg. 22880 (1986)

[10] Comments were filed by the following entities: California Association of the Physically Handicapped (CAPH); The Center for law and Social Policy (CLSP); Eastern Paralyzed Veterans Association (EPVA); Minnesota State Council for the Handicapped (MSCH); Paralyzed Veterans of American (PVA); State of Connecticut Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons (OPAHDDP). CLSP also included a copy of the comments it sent to the Department of Justice in response to DOJ's NPRM, 48 Fed. Reg. 55996 (1983) and *Supplemental NPRM*, 49 Fed. Reg. 7792 (1984).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

William J. Tricarico
Secretary

GEN. Docket No. 84-533

In the Matter of
Amendment of Part 1 of the

Commission's Rules to Implement
Section 504 of the Rehabilitation
Act of 1973, as Amended.
29 U.S.C. 794

ERRATUM

Released: April 29, 1987

1. On April 15, 1987, the Commission released a Report and Order (FCC 87-108) in the above-captioned proceeding. This erratum is being issued to correct an error that appeared in the Appendices.

2. In the original text, page one of Appendix B creates a new Subpart L to Part 1 of the Commission's rules. Appendix B, as corrected, creates a new Subpart N to Part 1 of the Commission's rules. The section numbers used in Appendix A and Appendix B, as corrected, read as follows:

Sec.1.1801	Purpose
1.1802	Application
1.1803	Definitions
1.1804-1809	[Reserved]
1.1810	Self-Evaluation
1.1811	Notice
1.1812-1829	[Reserved]
1.1830	General prohibitions against discrimination
1.1831-1839	[Reserved]
1.1840	Employment

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC.,	)	No. 87-7193
	)	FCC No. 87-108
	)	ORDER
Petitioner,	)	(Filed Sept. 5, 1990)
vs.	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
Respondent.	)	

Before: PREGERSON, WIGGINS, and BRUNETTI, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

1. **1977 Los Angeles Renewals**

   License Renewal Applications – Los Angeles, 69 F.C.C.2d 451 (1978), *reconsid. denied*, 72 F.C.C.2d 273 (1979), *aff'd in part and vacated in part, Gottfried v. FCC*, 210 U.S.App.D.C. 184, 655 F.2d 297 (1981), *rev'd in part, Community Television of Southern Calif. v. Gottfried*, 459 U.S. 498 (1983) and *cert. denied, Gottfried v. FCC*, 454 U.S. 1144 (1982).

2. **District Court Litigation**

   Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern Calif., No. CV-78-4715-R (C.D. Cal. Nov. 17, 1981), *rev'd*, 719 F.2d 1017 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern Calif.*, 813 F.2d 217 (9th Cir. 1987).

3. **EEO Proceeding ("CAPH I")**

   Equal Employment Opportunity Rules, 76 F.C.C.2d 86, *reconsid. denied*, 80 F.C.C.2d 299 (1980), *aff'd, California Ass'n of the Physically Handicapped, Inc. v. FCC*, 721 F.2d 667 (9th Cir. 1983), *cert. denied*, 469 U.S. 832 (1984) (also *aff'g California Paralyzed Veterans Ass'n v. FCC*, 496 F.Supp. 125 (C.D.Cal. 1980)).

4. **1980 Los Angeles Renewals (except KCET and KTLA)**

   KCOP Television, Inc., Mimeo 561, File Nos. BRCT-102, *et al.* (M.M.Bur. Nov. 3, 1983), *reconsid. denied*, Mimeo 14 (M.M.Bur. Oct. 2, 1984), *appeal dismissed, Gottfried v. FCC*, No. 84-1541 (D.C.Cir. Jan. 9, 1985).

5. **1980 KCET Renewal**

   Community Television of Southern Calif., 54 Radio Reg.2d (P&F) 857 (M.M.Bur. 1983), *reconsid. denied*, Mimeo 31 (M.M.Bur. Oct. 4, 1984).

6. **1980 KTLA Renewal and Transfer**

Golden West Television, Inc., 53 Radio Reg.2d (P&F) 854 (M.M.Bur. 1983), *reconsid. denied*, Mimeo 2545 (M.M.Bur. Feb. 27, 1984), *review denied*, FCC 84-537 (Nov. 16, 1984), *appeal dismissed, Gottfried v. FCC*, No. 85-1001 (D.C.Cir. March 12, 1985).

7. **1984 Metromedia Transfer ("CAPH II")**

Metromedia, Inc., 98 F.C.C.2d 300, *reconsid. denied*, 56 Radio Reg.2d (P&F) 1198 (1984), *appeal dismissed, California Ass'n of the Physically Handicapped, Inc. v. FCC*, 250 U.S.App.D.C. 202, 778 F.2d 823 (1985).

8. **Ownership Policy ("CAPH III")**

Paralyzed Veterans of America, FCC 85-651 (Dec. 12, 1985), *pet. for review dismissed, California Ass'n of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333 (9th Cir. 1987).

9. **1983 Los Angeles Renewals ("CAPH IV")**

Golden West Television, Mimeo 3155 (M.M.Bur. March 15, 1985), *rev. denied*, FCC 85-499 (Sept. 16, 1985), *reconsid. denied*, FCC 86-24 (Jan. 17, 1986), *aff'd., California Ass'n of the Physically Handicapped, Inc. v. FCC*, 268 U.S.App.D.C. 208, 840 F.2d 88, *rehearing en banc denied*, ___ U.S.App.D.C. ___, 848 F.2d 1304 (1988).

10. **1985 KTLA Transfer ("CAPH IV")**

Golden West Associates, Inc., 59 Radio Reg.2d (P&F) 125 (1985), *reconsid. denied*, FCC 86-235 (May 13, 1986), *aff'd., California Ass'n of the Physically Handicapped, Inc. v. FCC*, 268 U.S.App.D.C. 208, 840 F.2d 88, *rehearing en banc denied*, ___ U.S.App.D.C. ___, 848 F.2d 1304 (1988).

11. **1985 Metromedia Transfer**

Metromedia Radio & Television, Inc., FCC 85-606 (Nov. 27, 1985), *reconsid. denied*, FCC 86-81 (Feb. 20, 1986),

appeal pending, California Ass'n of the Physically Handicapped, Inc. v. FCC, No. 86-1177 (D.C.Cir. filed March 17, 1986).

12. **Rules for Activities "Conducted By" FCC**

Amendment of Part 1 of FCC Rules to Implement Section 504 of the Rehabilitation Act, 2 FCC Rcd 2199 (1987), *pet. for review pending, California Ass'n of the Physically Handicapped, Inc. v. FCC*, No. 87-7193 (9th Cir. filed May 4, 1987).
